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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 750

FRANK DAVIS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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I. The Jencks Issue

In its Brief in Opposition, the Government has directed its argument primarily to a discussion of the merits of the *Jencks* issue presented by this case, but has nowhere addressed itself to the importance and substantiality of this issue. This ingenuous approach should not be permitted to obscure the fact that the question here presented can arise in every federal criminal tax case because in every such case: (1) the special agent in charge of a criminal tax investigation makes a report at the conclusion of his investigation; (2) exhibits are always attached to his

report; and (3) he invariably testifies as a Government witness at the trial.

The Government seeks to avoid the thrust of this important issue by three different contentions: first, that the exhibits do not constitute the "statement of the witness" within the meaning of subsection (e) of the *Jencks Act* (Br. in Opp., p. 7); second, that some of these exhibits were either introduced or made available in whole or in part at the trial (Br. in Opp., pp. 7-8); and third, that Petitioner did not specifically ask for particular exhibits or show how they "could conceivably have aided him in impeaching Keller" (Br. in Opp., p. 9). None of these contentions are valid.

A. Keller's report consisted of a letter of transmittal with exhibits attached. In the letter of transmittal, Keller referred to the various exhibits; and in the course of his direct examination he testified to the material contained in these exhibits. By so doing and by basing his computations on the figures and other information contained in these exhibits, he made the exhibits an integral part of his report of examination. The letter of transmittal and the exhibits *together* constituted "a written statement" made by the government witness "and signed *or otherwise adopted or approved by him*" under subsection (e) (1) of 18 U.S.C. § 3500.

Under 18 U.S.C. § 3500 the Government could no more refuse to produce the exhibits to Keller's report than it could refuse to produce the last few pages of Keller's letter of transmittal. The *Jencks Act* provides that if the Government claims that any statement contains matter which does not relate to the subject matter of the testimony of the witness, "the court shall order the United States to deliver such statement for

the inspection of the court in camera." (18 U.S.C. § 3500 (c)). In this case, the exhibits were never delivered to the court for an *in camera* inspection and the Government's failure to do so, and the failure of the courts below to require such production, constitutes—we believe—a violation of the *Jencks Act*, and requires reversal.

B. The Government seeks to avoid the consequences of this failure to comply with the requirements of the *Jencks Act* by arguing that "nine of the fourteen exhibits in question had been previously introduced into evidence at the trial; and three of the remaining five * * * were produced * * * subsequently * * *." (Br. in Opp., p. 7).

The quoted statement is significant because it flatly concedes that five of the exhibits attached to the Keller report were not made available to the defense at the conclusion of Keller's direct testimony.[1] It eliminates any dispute on this issue and makes it perfectly clear that Petitioner was unable to use these exhibits in

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[1] Of the nine exhibits "previously introduced," six were copies of Petitioner's tax returns for the years 1944 through 1949, one was a certificate of Petitioner's income tax assessments and payments, one contained copies of Petitioner's financial statements prepared by his accountant, and one was the sworn statement of his accountant. None of these exhibits, with the possible exception of the last, was of significance for the purpose of cross-examining Keller.

Of the five exhibits withheld, on the other hand, one was the statement of an antagonistic witness (see fn. 3, p. 6, *infra*), one was the statement of Petitioner, one was the report of the Deputy Collector who had assisted in the investigation of Petitioner, one was a chronological list of conferences with Petitioner, and one contained the copies of net worth statements in prior examinations of Petitioner's return. These five exhibits, particularly the last, were extremely important for Petitioner's use in the cross-examination of Keller.

his cross-examination of Keller. That some of these exhibits were *later* produced or introduced does not vitiate the prejudice stemming from the trial court's failure to order them produced at the conclusion of Keller's direct testimony.

The plain intention of this Court's decision in *Jencks* v. *United States*, 353 U.S. 657, and the manifest purpose of the *Jencks Act*, was to insure that the statement of a Government witness would be made available at the conclusion of his direct testimony for use upon cross-examination. This procedure was clearly not followed at the trial of this case and, in consequence, Petitioner was deprived of five important exhibits for use in his cross-examination of Keller.

C. The Government has treated separately, and with somewhat greater particularity, the problems which arise with respect to two of the exhibits, L and N.

Exhibit L was described in the Keller report as "Copies of net worth statements prepared by agents of the Bureau of Internal Revenue in prior examinations of the tax-payer's return." This is all Petitioner has ever known about this particular exhibit. In its Brief in Opposition, the Government now tells us for the first time what Exhibit L in fact contains (Br. in Opp., pp. 1-9). It does so because it has a copy of the agent's report *with exhibits* in its own files and has made reference thereto for purpose of writing its Brief in Opposition. *But to this day Petitioner has never seen Exhibit L, nor have the courts below; nor, indeed, is the Exhibit presently available to this Court.*[2]

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[2] "* * * rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, harmless." *Gordon* v. *United States*, 344 U.S. 414, 420.

By reference to its private files, the Government now describes what is contained in Exhibit L and states further that a portion of Exhibit L was in the possession of Petitioner at the time of trial. But Petitioner, at the trial, never knew that he had any portion of Exhibit L and obviously could not have requested the remainder of this Exhibit, as the Government suggests he should have done.

The requirements of the *Jencks* decision and the *Jencks Act* cannot be complied with in this *nunc pro tunc* fashion: the trial is over and Petitioner can no longer utilize the contents of Exhibit L for cross-examination of Special Agent Keller at this final stage of the proceeding.

Exhibit N raises a problem even more devastating to the Government's position. Petitioner has never seen a copy of Exhibit N, and the Government makes no claim that he has. The best the Government can say about Exhibit N is that it "was not produced at the trial or ever requested by the defense, nor does the petitioner even now make any effort to explain how it could conceivably have aided him in impeaching Keller or accomplishing any other purpose" (Br. in Opp., p. 9).

The record does not support the Government's first claim. A specific request was made by the defense for production of the letter of transmittal and all exhibits comprising Keller's report (151a). Furthermore, nothing in this Court's decision in the *Jencks* case, and nothing contained in the *Jencks Act*, even remotely suggests that the defense must make a showing as to how a witness' statement "could conceivably have aided in impeaching" a Government witness. On the contrary, this Court has held that:

"Because only the defense is adequately equipped to determine the effective use for purpose of discredifying the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

"The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved." 353 U.S. at 668-669.

The Government's argument with respect to Exhibit N is an effort to set the clock back and restore the law to a point prior in time both to this Court's decision in the *Jencks* case and the enactment of the *Jencks Act*. *Cf.*, *Bowman* v. *United States* (C.A. 6), 253 F. 2d. 933.

II. Likely Source

In responding to the question relating to "likely source," the Government has apparently adopted the role of the proverbial ostrich, hoping that by ignoring the question, it will fade away. It simply dismisses the problem by the cavalier observation: "There was no source problem in this case." (Br. in Opp., p. 10).[3]

[3] In its attempt to minimize the importance of the question of likely source, the Government relies heavily upon the testimony of a witness that she saw the defendant destroy cash register tapes (Br. in Opp., p. 11).

The uncontroverted evidence in this regard was that this witness did not work for Petitioner at any time during the indictment year 1948, and only commenced working after July 1, 1949 (283a-284a, 292a, 523a, 524a, 526a), the approximate date of the opening of the new restaurant. By this date all of the excess deposits, approximating the amount of the understatements had been deposited to Petitioner's checking account to pay for rebuilding the restaurant (Petition, p. 14).

If this case does not present an issue of "likely source," then it is difficult to envision a case that would. There is no claim that Petitioner was engaged in any undisclosed business, nor that he had any source of unreported income. The only issue is whether the claimed additional income did or did not come from his restaurant business during the indictment years.

The uncontroverted evidence is clear (1) that during the year 1948, Petitioner's restaurant business was closed for a period of time and that it was also operated at a temporary location where business was below normal; (2) that during the year 1949, Petitioner's business was closed for four months; and (3) that during these periods in 1948 and 1949, Petitioner deposited excess funds to his checking account, in the approximate amount of the alleged understatements, with the deposits correlating exactly with the dates of his entries to his safe-deposit box. In addition, there is the crucial admission of Special Agent Keller that he did not know until the trial was in progress that Petitioner's restaurant had been closed during the indictment years and that no income had been derived from it during periods of 1948 and 1949. In the light of this uncontradicted evidence, the requisite showing that Petitioner's business accounted for his increases in net worth during the indictment years was plainly absent. (See generally, Petition, pp. 28-30).

The gist of Petitioner's contention is (1) that the Government has assessed or claimed that Petitioner understated his income for the years 1942 through 1947; (2) that these understatements were not credited to Petitioner as a source of funds on hand as of the net worth starting point, December 31, 1947; and (3) that if Petitioner had been given credit for the unreported

income of pre-indictment years, his claimed cash on hand figure in the opening net worth would have been substantiated, and the Government's case destroyed.

The statement made by the Government in the last paragraph of its Brief (Br. in Opp., pp. 11-12) graphically portrays the fundamental error complained of by Petitioner. Since cash on hand, an essential item in net worth, was in dispute, the Government's net worth determinations for the years 1942 through 1947 could not "automatically" give Petitioner "credit" for the additional income computed by the Government for these pre-indictment years; particularly in view of the fact that Keller's "net available funds statement" (Petition, p. 11) was based solely on "income per returns" (119a-120a, 122a, 188a) and the net worth increase listed as an expenditure therein was based solely on "visible" assets. "Visible" assets obviously did not include cash on hand.

The basic error, which reaches to the heart of this issue, is contained in Keller's "net available funds statement". This statement, by failing to include the additional income from the pre-indictment years, and in particular the agreed additional income for the years 1942 and 1943, did not conform to the Government's own evidence, and did not fully state the facts as they were known to the Government. See *United States* v. *Altruda* (C.A. 2) 224 F. 2d 935. As this Court warned in *Holland* v. *United States* "* * * unless that increase [in net worth] can be reasonably allocated to the appropriate tax year the taxpayer may be convicted on counts of which he is innocent." 348 U.S. 121, 129.

The Government's failure to include the additional income computed by it for the pre-indictment years

denied Petitioner the benefit of this important source of funds from pre-indictment years. By omitting this substantial source of funds, the Government thereby failed to negative all non-taxable sources of funds and was clearly required, under *Holland* v. *United States*, *supra*, and *United States* v. *Massei*, 355 U.S. 595, to prove a "likely source" capable of accounting for the increases in net worth attributed to Petitioner for the indictment years.

CONCLUSION

For the foregoing reasons and for the reasons contained in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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